11-3-2011

Two Jinn, Inc. v. Idaho Dept. of Ins. Appellant's Brief Dckt. 38759

IN THE SUPREME COURT OF THE STATE OF IDAHO

TWO JINN, INC., a California corporation duly qualified to do business in Idaho and doing business as Aladdin Bail Bonds and Anytime Bail Bonds, Petitioner-Appellant, vs. IDAHO DEPARTMENT OF INSURANCE, Respondent.	Supreme Court Case No. 38759

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, In and For the County of Ada

HONORABLE KATHRYN A. STICKLEN
Presiding Judge

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A. Nature of the Case

Two Jinn, Inc., which does business in Idaho as Aladdin Bail Bonds and Anytime Bail Bonds (hereinafter "Two Jinn" or "Aladdin"), appeals from the district court's memorandum opinion and order issued in connection with Two Jinn's petition for judicial review of the Idaho Department of Insurance's (hereinafter "DOI") Findings, Conclusions and Final Order on Request for Declaratory Ruling ("Final Order"). This Court should reverse the Final Order because the DOI erroneously declared that Idaho Code § 41-1042 precludes bail agents and their surety from entering into an indemnity agreement at the time of a bail transaction which permits recovery of apprehension costs later incurred should a criminal defendant fail to appear as required in court.

B. Procedural and Factual History

Aladdin is licensed by the State of Idaho as a producer of bail surety insurance and Danielson National Insurance Company (hereinafter "Danielson") is authorized by the State of Idaho in surety insurance. Agency Record (hereinafter A.R.) 111.[1] Aladdin utilizes bail bonds issued by Danielson in connection with its pretrial release services and to that end, uses a form entitled "Indemnity Agreement for Surety Bail Bond." *Id.* The Third Paragraph of this Indemnity Agreement requires the contracting parties:

> THIRD: To reimburse [Aladdin] and Surety for actual expenses incurred and caused by a breach by the Principal of the terms for which the Application and Bail Bond were written, including all expenses or liabilities incurred as a result of searching for, recapturing or returning Principal to custody, incurred by [Aladdin]

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[1]The parties stipulated to these facts in the proceedings before the DOI. Tr. (3-8-2010) pp. 6-7; *also* A.R. 69-71, 110-111.

> or Surety or as necessary in apprehending or endeavoring to apprehend Principal, including legal fees incurred by [Aladdin] or Surety in making application to a court for an order to vacate or to set aside the order of forfeiture or Judgment entered thereon. However, no expenses or liabilities incurred for recapturing or returning Principal to custody shall be chargeable after the entry of Judgment.

A.R. 12, 111 (hereinafter "Third Paragraph" or "Paragraph Three").

This paragraph has significance when a criminal defendant released on bail breaches the bail bond agreement by failing to appear for court as ordered and the court orders the bail bond forfeited. In such situations, the surety insurance company or its bail agent may exercise its authority pursuant to Idaho Code § 19-2914[2] and arrest the criminal defendant. If such a defendant appears before the court within 180 days following the order forfeiting the bail, the court will exonerate the bail pursuant to Idaho Code § 19-2922(5). The Third Paragraph of the Indemnity Agreement allows Aladdin and Danielson to recover costs they expend in apprehending and returning a criminal defendant to custody in order to have the forfeiture set aside and the bond exonerated.

In 2004, Two Jinn and DOI representatives discussed the position of a DOI representative that Idaho Code § 41-1042, which addresses the collections and charges a bail agent may assess for his or her services in the bail transaction, precludes Aladdin from entering indemnity agreements such as Paragraph Three. Clerk's Record ("C.R.") 12. Aladdin notified the DOI via letter of its position that Section 41-1042 does not limit the remedies available upon breach of the bail bond agreement and that Aladdin was entitled to continue collecting reasonable apprehension costs. *Id.* The DOI did not substantively respond to this letter. *Id.*

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[2] Pursuant to Section 19-2914, the surety insurance company or its bail agent "may empower any person of suitable age and discretion to arrest the defendant at any place within the state" at any time before the exoneration of bail.

In January 2009, a DOI representative sent a letter to Danielson and instructed it to amend the Indemnity Agreement to eliminate the provision regarding collection of apprehensions costs. *Id.* at 12-13. This letter prompted a renewed good faith discussion between Aladdin and the DOI regarding Section 41-1042's applicability to apprehension costs. *Id.* Following the parties' continued disagreement, they discussed that Aladdin would seek a declaratory ruling on Section 41-1042's scope from which Aladdin would thereafter seek judicial review, if necessary. *Id.*

In December 2009, Two Jinn asked the DOI to declare that Idaho Code § 41-1042 does not preclude a bail agent or its surety from entering into indemnity agreements at the time of the bail transaction such as that set forth in Paragraph Three, which permit recovery of apprehension expenses. A.R. 1-10. In a preliminary order, a hearing officer concluded that Idaho Code § 41-1042 precludes agreements providing for reimbursement of apprehension and surrender costs. A.R. 69- 77. After further argument and briefing, the DOI Director issued his Final Order, which concluded that Idaho Code § 41-1042 precludes bail agents and sureties from entering into indemnity agreements for the reimbursement of apprehension costs contemporaneous with the bail transaction. A.R. 109-122.

Aladdin timely filed a Petition for Judicial Review with the district court and a motion to stay the Final Order. C.R. 4-9. The district court stayed enforcement of the Final Order pending resolution of Aladdin's petition for judicial review but ultimately affirmed the DOI's Final Order. C.R. 55-56, 122-129. This appeal follows.

III. ISSUE ON APPEAL

Should this Court reverse the Final Order because the DOI's declaration that Idaho Code § 41-1042 precludes Aladdin from entering into an indemnity agreement at the time of a bail

transaction which permits collection of apprehension costs later incurred should a criminal defendant fail to appear as required is unreasonable and prejudices Aladdin's substantial rights?

IV. ARGUMENT

A. Standard of Review

This Court reviews the DOI's decision independently of the district court. *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011); *Kuna Boxing Club, Inc. v. Idaho Lottery Com'n*, 149 Idaho 94, 97, 233 P.3d 25, 28 (2009). A reviewing court may overturn an agency decision if it was: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion." Idaho Code § 67-5279(3).

The judiciary is free to correct errors of law in an agency's decision. *Mercy Medical Center v. Ada County, Bd. of*, 146 Idaho 226, 229, 192 P.3d 1050, 1053 (2008); *Love v. Bd. of County Comm'rs of Bingham County*, 105 Idaho 558, 559, 671 P.2d 471, 472 (1983); *see also Vickers*, 150 Idaho at 442, 247 P.3d at 669 (Supreme Court freely reviews questions of law). Because the DOI is entrusted to administer the Insurance Code which includes Idaho Code § 41-1042, this Court "may defer" to the DOI's statutory interpretation so long as that interpretation is reasonable and not contrary to the statute's express language. *See Kuna Boxing Club, Inc.*, 149 Idaho at 97, 233 P.3d at 28. Nevertheless, "'the ultimate responsibility to construe legislative language to determine the law' rests with the judiciary, and the underlying consideration whether to grant such deference is to ascertain and give effect to legislative intent." *Kuna Boxing Club, Inc.*, 149 Idaho at 97, 233 P.3d at 28, *citing Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d

903, 905 (2001) and *Simplot v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1210-11 (1991). "An agency construction will not be followed if it contradicts the clear expressions of the legislature because 'the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Simplot*, 120 Idaho at 862, 820 P.2d at 1211, *citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

In interpreting a statute, the court first looks to the statute as written and determines whether the language is clear and unambiguous. *In re Daniel W.*, 145 Idaho 677, 680, 183 P.3d 765, 768 (2008); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). If it is, the language of the statute is given its plain, obvious, and rational meaning. *In re Daniel W.*, 145 Idaho at 680, 183 P.3d at 768; *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). The plain meaning of a statute will prevail unless the clearly expressed legislative intent is contrary or unless the plain meaning leads to absurd results. *Driver v. SI Corp.*, 139 Idaho 423, 427, 80 P.3d 1024, 1028 (2003). If the language is ambiguous, courts must ascertain the legislative intent and give effect to that intent. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Madden*, 147 Idaho 886, 888, 216 P.3d 644, 646 (Ct. App. 2009). The standard rules of statutory construction require deriving legislative intent by looking to the literal words of the statute, the content of those words, the public policy behind the statute and its legislative history. *Rhode*, 133 Idaho at 462, 988 P.2d at 688.

B. Idaho Code § 41-1042 Does Not Limit a Bail Agent's Ability to Recover Apprehension Costs Pursuant to an Indemnity Agreement Entered During the Bail Transaction

By its plain terms, Idaho Code § 41-1042 does not apply to the remedies available to the parties in the event of a breach of the bail bond agreement and, rather, addresses charges that may be assessed for the bail agent's services during the bail transaction. Further, the DOI's interpretation of Section 41-1042 is illogical and internally inconsistent in that it permits bail agents to contract for one remedy in the event of breach – the agreement to pay the forfeiture – but not contract for another remedy in the event of breach – the agreement to pay apprehension costs, when neither remedy is enumerated in Section 41-1042. Finally, even if the statutory language were ambiguous, legislative history and public policy confirm a legislative intent to allow bail agents to contract for the recovery of contingent losses, including apprehension expenses, at the time of the bail transaction. Accordingly, the DOI's interpretation of Section 41-1042 is unreasonable and erroneous and this Court should reverse the Final Order.

1. Idaho Code § 41-1042's plain language does not preclude recovery of the breach remedy reflected in Aladdin's indemnity agreement

Idaho Code § 41-1042 provides:

> (1) Notwithstanding any other provision of this chapter, a bail agent *in any bail transaction* shall not, directly or indirectly, charge or collect money or other valuable consideration from any person except for the following:
>
> > (a) To pay premiums at the rates established by the insurer;
> > (b) To provide collateral;
> > (c) To reimburse the bail agent for actual expenses incurred in connection with the bail transaction, limited to the following:
> >
> > > (i) Expenditures actually and reasonably incurred to verify underwriting information or to pay for notary public fees;

> provided however, that the total of all such expenditures reimbursed shall not exceed fifty dollars ($50.00); and
>
> (ii) Travel expenses incurred more than twenty-five (25) miles from a bail agent's place of business, which includes any city or locality in which the bail agent advertises or engages in bail business, up to the amount allowed by the internal revenue service for business travel for the year in which the travel occurs.
>
> (2) Except as permitted under this section, a bail agent *shall not make any charge for his service in a bail transaction* and the bail agent shall fully document all expenses for which the bail agent seeks reimbursement.

(emphasis added).

Thus, Section 41-1042 limits the reimbursement a bail agent may seek for his or her services and expenses in connection with the bail transaction. The Third Paragraph of the Indemnity Agreement does not describe charges for such services and expenses and, instead, obligates the indemnitor (the criminal defendant and/or a third party guarantor) to agree to reimburse expenses that might be incurred at a later date in the event the criminal defendant breaches the bail bond agreement by failing to appear in court as ordered and it becomes necessary to apprehend and return the defendant to custody. Section 41-1042 has no application to this agreement to pay contingent recovery expenses.

This conclusion is reinforced by the statute's express provision permitting bail agents to collect collateral to secure the bail bond, which necessarily contemplates that the parties may enter contracts describing remedies in the event of a breach of the bail bond agreement. Further, the DOI acknowledges that Section 41-1042 does not preclude bail agents from obtaining the defendant and third party indemnitor's agreement to reimburse the bail agent and surety for the face amount of the bail bond in the event of forfeiture. It is illogical and inconsistent to conclude

the statute's plain terms do not apply to one unenumerated breach remedy – the agreement to reimbursement the bail agent for the forfeiture – yet preclude a different unenumerated breach remedy – reimbursement for apprehension expenses. Rather, Section 41-1042 applies to neither remedy since neither is a charge for the bail agent's service in the bail transaction.

a. the Third Paragraph does not describe charges for the bail agent's service in the bail transaction

Idaho Code § 41-1042 prohibits a bail agent from "charg[ing] or collect[ing] money or other valuable consideration" in any bail transaction except to pay premiums, to provide collateral and to reimburse for certain enumerated expenses incurred during the underwriting process. This section only implicates charges for the bail agent's "service in a bail transaction." *See* Idaho Code § 41-1042(2) ("a bail agent shall not make any charge for his service in a bail transaction" except as permitted under this section).

A bail agent's service in connection with the bail transaction includes tasks such as gathering information concerning a criminal defendant's background, ties to the community, family ties, criminal history, credit history, the financial wherewithal of all those involved as well as other relevant factors in evaluating the risk posed by executing a particular bond. The bail agent then negotiates the terms under which Aladdin is willing to execute the bail bond, including the possibility of requiring the defendant's participation in a supervised bail program, the provision of a third-party indemnitor or collateral to secure the bond. The agreement to pay apprehension costs in the event of a breach by the principal as provided in the Third Paragraph does not describe charges for the bail agent's service in the bail transaction. Rather, the contingent costs described in this paragraph concern the remedy available to Aladdin and its

surety following the bail transaction which is implicated only in those situations where the principal breaches his obligations.

As noted by the district court, "the applicable portion of the statute concerns bail agent reimbursement for charges actually incurred" for the bail agent's services in the bail transaction. C.R. 129. These enumerated expenses include those incurred to verify underwriting information or to pay for notary public fees and travel expenses. Idaho Code § 41-1042(1)(c). Unlike the reimbursement for contingent apprehension expenses set forth in Paragraph Three, those enumerated expenses illustrate the types of charges incurred in connection with the bail agent's service in the bail transaction and relate to the bail agent's service in executing the bail bond.

In its memorandum opinion and order, the district court mischaracterized Aladdin's argument as being that the terms of the statute only apply to "bail transactions" and "that seeking recovery of expenses incurred pursuant to a bail contract's terms is not a bail transaction." C.R. 128. Aladdin instead argues that the statute only limits charges for the bail agent's service in a bail transaction and that an agreement describing the parties' remedies in the event of breach does not constitute charges for such services. That the parties execute the indemnity agreement as part of the bail transaction does not convert the contingent reimbursement set forth therein to "charge[s] for the [bail agent's] service in a bail transaction" within the scope of Section 41-1042.

The district court further found that "the indemnity agreement is a part of the overall bail transaction, for which Two Jinn is receiving a fee and collecting a charge" and that the "collection of costs of apprehension is [arguably] a 'charge.'" C.R. 129. Bail agents do not endeavor to recover fugitives who have breached the bail bond agreement as a "service" in the bail transaction.

Regardless of the timing, the reimbursement set forth in the agreement concerns contingent expenses unrelated to charges incurred during the bail transaction.

Section 41-1042 clearly and unambiguously applies to charges assessed for the bail agent's services in connection with a *bail transaction*, i.e., issuing and posting a bail bond. The Third Paragraph of the Indemnity Agreement does not set forth charges assessed in connection with the bail agent's service in the bail transaction and, instead, provides for reimbursement of expenses in the event the defendant breaches his obligations and fails to appear in court. Thus, the plain language of Section 41-1042 does not preclude Aladdin from entering indemnity agreements such as that set forth in this paragraph at the time of the bail transaction.

b. the Third Paragraph does not constitute "valuable consideration" prohibited by the statute

According to the DOI, "because Aladdin requires the Indemnity Agreement in order to obtain bail and because it consists of a promise to pay, it violates Idaho Code § 41-1042 because it constitutes a prohibited 'charge' or at least a 'valuable consideration' not among those expressly permitted." A.R. 113-114 (Final Order, pp. 5-6); *see also* C.R. 128-29 (noting Aladdin will not conclude the bail transaction without the bail contract). This argument is unavailing.

The Final Order acknowledges that a bail agent may require the defendant to agree to a number of terms as part of the bail contract, including contracting with the defendant and a third party indemnitor to be liable for the face amount of the bail bond in the event of breach. *See* A.R. 119 (positing hypothetical where the "indemnitor wants to limit his losses to being liable for the face amount of the bond *as previously promised* but does not want to also be responsible for attempted recovery costs." (emphasis added)). This prior promise, of course, is obtained at the

time of the bail transaction. However, the DOI does not assert the promise to pay the forfeited amount of the bond in the event of breach constitutes "valuable consideration" prohibited by the statute despite the fact that this promise is not enumerated as a permissible charge in Section 41-1042.

The DOI's interpretation of Section 41-1042 is internally inconsistent as neither the promise to pay the bail bond in the event of forfeiture nor the promise to pay investigative costs is enumerated in Section 41-1042 as an allowable charge. A promise to pay apprehension costs in the event of a breach cannot constitute "valuable consideration" prohibited by the statute if a promise to pay the face amount of the bond in the event of breach does not. Instead, Section 41-1042 has no application to either remedy because neither represents a charge for the bail agent's service during the bail transaction. Accordingly, the DOI's interpretation is unreasonable and contrary to the statute's plain language.

Further, it could be argued that innumerable matters associated with the Indemnity Agreement utilized by Aladdin or other bail agents constitute "valuable consideration" not set forth in Section 41-1042. For instance, bail agents require the principal to promise to appear in court as ordered, may require a third-party relative to sign an indemnity agreement in addition to the principal or may require the principal to agree to supervised bail where he or she is required to check in with the bail agent at specified times to ensure the principal is meeting his or her obligations. *See* A.R. 111-112 (Final Order, pp. 3-4) ("[I]t is not uncommon for a bail agent and surety to require additional conditions beyond the fundamental requirement to appear at all required court hearings as part of the issuance of the bail bond. Additional requirements can include requiring the principal to periodically check in with the bail agents."). The DOI does not

dispute the appropriateness of a bail agent requiring such consideration as a condition of the bail bond even though none of the foregoing are specifically enumerated in the statute.[3]

Nor should the DOI assert otherwise. None of the foregoing, including a promise to pay the forfeited amount of the bond, constitute a "charge" or attempt to "collect money or other valuable consideration" for the bail agent's service in the bail transaction.

2. Section 41-1042's collateral provision further demonstrates that the DOI's interpretation of this statute is unreasonable

Idaho Code § 41-1042 permits bail agents to "collect money or other valuable consideration" to "provide collateral." Idaho Code § 41-1042(1)(b). Title 41 defines "collateral" as "property of any kind given as security to obtain a bail bond." Idaho Code § 41-1038(2). This collateral may not be excessive in relation to the face amount of the bond. Idaho Code § 41-1043. Thus, rather than precluding a bail agent from contracting for remedies in the event of a breach of the criminal defendant's obligations under the bail bond, Section 41-1042 expressly contemplates the existence of such remedies by permitting bail agents to take collateral from the consumer to protect against contingent losses.

a. <u>the propriety of indemnity agreements must be recognized to give effect to Section 41-1042's collateral provision</u>

A statute must not be construed in a way which makes mere surplusage of provisions included therein. *Sweitzer v. Dean*, 118 Idaho 568, 571-72, 798 P.2d 27, 30-31 (1990). If indemnity agreements were barred by Section 41-1042 and bail agents were precluded from

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[3] Indeed, counsel for the DOI staff agreed that many of the provisions contained in Aladdin's Indemnity Agreement are acceptable including requiring the criminal defendant to provide a third-party indemnitor who agrees to pay the bail bond in the event the defendant fails to appear and requiring the defendant to agree to appear for all court appearances and to periodically check in with the bail agent. Tr. (March 8, 2010) p. 18, ln. 9-22; p. 20, ln. 22-24.

requiring a criminal defendant or others to be responsible for expenses in the event of the bail's forfeiture, there would be no need for collateral. The DOI's interpretation of Section 41-1042 as precluding bail agents from entering into indemnity agreements at the time of the bail transaction renders those sections governing bail agents' acceptance of collateral during the bail transaction mere surplusage.

Idaho Code § 41-1042 does not limit the remedies available in the event of a breach of the bail bond nor does it limit the losses to which collateral may be applied in the event of a breach.[4] While the collateral must not be excessive in relation to the bond amount and there are requirements regarding how it is handled,[5] there is no limitation placed on a bail agent's ability to apply this collateral towards a duly contracted for loss such as a forfeited bail bond or the costs of apprehending a criminal defendant in order to prevent the forfeiture.

The DOI has consistently acknowledged that the collateral which a bail agent is permitted to collect under Section 41-1042(1)(b) may be applied towards the amount of the forfeited bail bond. *See* A.R. 116; Tr. (July 21, 2010) p. 15, ln. 7 - p. 16, ln. 8. The DOI's position is illogical as Section 41-1042 does not expressly reference requiring the parties to be liable for the bail bond as an allowable "charge." Section 41-1042 cannot be read to permit bail agents to contract for payment of the entire bail bond but to prohibit agents from contracting for reimbursement of apprehension expenses incurred in order to avoid payment of the entire bail bond.

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[4] Paragraph Eight of the Indemnity Agreement utilized by Aladdin provides that any collateral collected may be applied to the obligations, liabilities, losses, costs, damages and expenses specified in the Agreement. A.R. 12.

[5] For example, collateral must be deposited and maintained in a separate trust account if collateral is received in the form of cash or in a separate and secure location apart from the bail agent's assets if not in cash. *See* Idaho Code §§ 41-1043(1) and (2)

b. indemnity agreements are given to secure the bail bond and guarantee the promise to appear in court and thus more closely resemble a form of "collateral" than valuable consideration for the bail agent's services

To the extent that the contingent agreement described in the Third Paragraph is "valuable consideration" charged in a bail transaction, it must be construed as a form of collateral expressly permitted by Idaho Code § 41-1042(1)(b). The district court found, however, that this argument "distorts the traditional and accepted meaning of" the term "collateral." C.R. 129. Even if the Indemnity Agreement is not the type of property that is normally contemplated as collateral, it is given to secure the bail bond and, thus, more closely resembles a form of collateral than a charge for the bail agent's service in the bail transaction. *See* BLACK'S LAW DICTIONARY 1090 (7th ed. 2000) (defining "collateral security" as "a security, subordinate to and given in addition to a primary security, that is intended to guarantee the validity or convertibility of the primary security"). A defendant or third party's agreement to pay expenses in the event of forfeiture of the bond – the agreement to reimburse the bail agent for apprehension expenses or the forfeiture itself should those efforts fail – is given as security to obtain a bail bond and to guarantee the validity of the principal's promise to appear as ordered by the court.

Thus, if the Third Paragraph is "valuable consideration" charged in a bail transaction, it falls squarely within the definition of collateral and is permissible pursuant to Idaho Code § 41-1042(1)(b). In order to reconcile the DOI's contention that indemnity agreements such as the Third Paragraph are "valuable consideration" charged for the bail agent's service in a bail transaction with Section 41-1042's express recognition of indemnity agreements by providing for collateral to secure the bail bond, such agreements themselves must be considered as a form of collateral.

If bail agents were not permitted to enter contracts during the bail transaction that described the remedies available in the event the bail bond is breached, there would be no reason to permit bail agents to collect collateral to secure the bail bond. Section 41-1042 expressly contemplates that parties will enter agreements regarding the remedies available in the event the bail bond is breached.

3. The Idaho Legislature would not have adopted a statute that thwarted the purpose of bail and created grave public safety issues

The public policy underlying bail bonds and encouraging the return of fugitives to custody, existing Idaho case law, the legislative history of Idaho Code § 41-1042 and authority from other jurisdictions throughout the United States all establish that bail agents are entitled to contract for the fair and reasonable value of costs incurred in connection with apprehending and surrendering a principal to the court's custody. Recognizing bail agents' ability to recover such costs furthers the public policy underlying bail bonds by promoting the defendant's appearance in court and promotes public safety. Thus, even if the language of Section 41-1042 is ambiguous as to whether it limits remedies pursuant to an indemnity agreement, standard rules of statutory construction demonstrate that agreements such as Paragraph Three do not fall within the statute's scope.

a. permitting the recovery of apprehension costs is consistent with the purpose of bail and public policy which encourages the return of fugitives to custody

Prohibiting bail agents such as Aladdin from recovering expenses incurred in recapturing and surrendering a defendant is contrary to public policy and creates significant public safety issues. The primary purpose of bail is to ensure the presence of the accused. *State v. Quick*

Release Bail Bonds, 144 Idaho 651, 655, 167 P.3d 788, 792 (Ct. App. 2007). Bail agents have the authority, and in fact are encouraged, to arrest a defendant who has missed a court appearance and return him to court. *See* Idaho Code § 19-2914 (at any time before the exoneration of bail, the surety insurance company or its bail agent . . . may empower any person of suitable age and discretion to arrest the defendant at any place within the state"); Idaho Code § 19-2922 ("court shall order the bail exonerated: if the "defendant has appeared before the court within one hundred eighty (180) days of the court's order of forfeiture"); I.C.R. 46(h) (permitting court to set aside forfeiture if it appears that justice does not require its enforcement after consideration of several factors including "the participation of the person posting bail in locating and apprehending the defendant").

It is axiomatic that there are costs associated with locating and apprehending absconding criminal defendants. Further, it is not disputed that Aladdin can seek reimbursement for the amount of a bail bond forfeiture. However, if Aladdin could not recover investigation costs, yet could recover the amount of the forfeited bond, it would have no financial incentive to locate and return a criminal defendant to court. In such circumstances, the criminal fugitive would remain free and public safety would be compromised. Such a result is contrary to the bail bond's purpose of ensuring the defendant's appearance in court.

The purpose of bail is served by providing the surety a financial incentive to locate absconders and return them to the court. *See County Bonding Agency v. State*, 724 So.2d 131, 133 (Fla. App. 1998) ("The purpose of [a Florida statute permitting exoneration when the surety has substantially attempted to procure or cause the apprehension or surrender of the defendant] is to create a financial incentive for sureties to locate and apprehend fugitives"); *Board of Com'rs of*

Brevard v. Barber Bonding Agency, 860 So.2d 10, 12 (Fla. App. 2003) (Liberal interpretation of forfeiture statutes in favor of sureties provides incentives to sureties "to pursue those who flee the jurisdiction"). The DOI's construction of Section 41-1042 discourages bail agents from returning fugitives and instead encourages them to simply collect the amount of the forfeited bond. The legislature would not have enacted a statute that thwarted public policy.

Further, the criminal defendant and his indemnitor's obligation under the Third Paragraph provide an important incentive to the defendant to appear for court. If the criminal defendant knows that neither he nor his indemnitors, often family or friends, will be financially responsible in the event he absconds, he is more likely to skip bail. Similarly, if the indemnitors are financially responsible if the defendant skips bail, they have a financial incentive to assist the defendant in making it to court or to assist the bail agents in effectuating the defendant's surrender should he fail to do so.[6]

b. the DOI's suggestion that apprehension cost be negotiated after the breach has occurred is unrealistic and harmful to both the public and the consumer

According to the DOI, bail agents should negotiate recovery of apprehension costs after the breach has occurred thereby meeting the public's interest in ensuring the presence of the accused. A.R. 118-119 (Final Order, p. 10-11) ("By permitting a bail agent to seek to enter into a new transaction, albeit related to the bail transaction, for recovery of the principal including the reimbursement of recovery and apprehension costs, the goals of encouraging recovery and ensuring the presence of the defendant at court hearings are preserved."). The DOI's assertion in

[6] It also must be noted that the expense of apprehending and returning the principal to the court is often less than the actual bond amount. In this instance, the indemnitor is better served by funding the costs of apprehension and return of the criminal defendant as opposed to paying the cost of the forfeited bond.

this regard is unrealistic and harmful to the public and the consumer.

In a bail transaction, there is often no third party indemnitor and, thus, it is only the criminal defendant who agrees to be responsible for the forfeited bond. Of course, no bail agent is going to investigate an absconding defendant's whereabouts for the purpose of negotiating the recovery of investigative expenses with that defendant – and no absconding defendant is going to agree to reimbursement of expenses already incurred absent a prior agreement. In these scenarios, the bail agent will let the forfeiture stand, particularly when there is collateral to secure the bail bond or adequate assets against which a judgment can be collected. In those instances, the bail agent will have no incentive to return the fugitive to custody and the purpose of bail is thwarted.

Additionally, the parties should negotiate the liability and breach remedies relating to the bail transaction on one occasion, just as with any other transaction. In no forum are breach remedies required to be negotiated after the breach has occurred. It would be altogether impractical and unproductive for the parties to a car loan, a construction project or any other commercial transaction to come together after a breach has occurred and attempt to agree to the remedies for that breach.

Similarly, it is unrealistic to expect that a bail agent and a third party indemnitor will sit down at the table again after the breach has occurred and work out the breach remedies including the apprehension costs the indemnitor will pay. A bail agent who can simply collect the face amount of the bond from that indemnitor is unlikely to undertake the time and expense of attempting to negotiate the recovery of apprehension expenses after a defendant has failed to appear. Under this scenario, the fugitive remains free to the detriment of the general public as well as the consumer/indemnitor who otherwise might have benefitted financially by paying

lower apprehension costs rather than the full penal sum of the bond.

c. the DOI's concern over protecting the bail consumer from unreasonable investigation costs is not compelling

The DOI apparently believes its construction of Section 41-1042 is necessary to protect against "unscrupulous and unfair practices of incurring apprehension costs that an indemnitor could argue were unnecessary or excessive." A.R. 119 (Final Order, p. 11); *see also* A.R. 120 (Final Order, p. 12) ("The fact the charge is latent and conditional does not necessarily assist the consumer or relieve the need to protect a consumer. Rather, it is more critical to protect the consumer where significant investigative or apprehension fees and expenses may be incurred when the consumer is not aware of the likelihood and is focused only on obtaining the defendant's release from jail."). This concern is unpersuasive.

Initially, the record does not reflect any instances where a bail agent has attempted to collect unreasonable apprehension fees. Aladdin is already of the view that apprehension costs must not be excessive in relation to the face amount of the bond. *See, e.g.* Idaho Code § 41-1043 (collateral may not be excessive in relation to the face amount of the bond). In fact, the Final Order notes that in the legislative history underlying Section 41-1042, there were very few complaints concerning bail bonds and of those complaints, most involved the handling of collateral. A.R. 114. If a bail agent did pursue collection of unreasonable apprehension costs, the consumer would have a defense to payment of these costs. *See, e.g. Saladino v. Stuyvesant Ins. Co.*, 39 A.D.2d 765 (N.Y. App. Div. 1972) (holding bail agent was entitled to recover expenses incurred in apprehending principal pursuant to indemnity agreement provided such expenses are fair and reasonable; $4,000 investigator fee was unreasonable as the principal was residing with

his wife without any attempt at concealment and working at his regular employment).

The DOI agrees that Aladdin can require an indemnitor to post collateral at the time of the bail transaction to secure the entire amount of the bail bond. An additional promise – secured or unsecured – to reimburse Aladdin for apprehension expenses incurred in returning an absconder to court does not expose the defendant or his indemnitor to any additional risk of injury, particularly because the total liability must not be excessive in light of the face amount of the bond. Indeed, such agreements protect the consumer and as discussed above serve a compelling public interest by providing Aladdin and other bail agents with an incentive to re-capture the defendant and obtain exoneration of the bond, rather than simply letting the forfeiture stand and collecting the entire amount of the bond from the indemnitor or defendant. Further, an indemnitor is better served by funding the costs of apprehension and return of the criminal defendant as opposed to paying the higher cost of a forfeited bond.

The Final Order discusses two circumstances in which an indemnitor may prefer not to agree to reimburse apprehension costs notwithstanding these concerns: (1) the indemnitor believes that he will have a better chance of convincing the defendant to appear or surrender or (2) the indemnitor believes that searching for the defendant would be futile so wants to limit his liability to the face amount of the bond. A.R. 119.

Preliminarily, the overriding consideration should not be an indemnitor's preference to not be responsible for apprehension costs, particularly after the breach has occurred. This indemnitor is often the criminal defendant himself or it may be a family who does not want to see the criminal defendant returned to custody. Further, this indemnitor had a choice whether to engage the services of a bail agent and which bail agent to use. Aladdin requires indemnitors to agree that if

there is a breach of the bail agreement, the indemnitor will be contractually liable to pay actual and reasonable apprehension expenses incurred in returning the defendant – now a criminal fugitive – to custody as a remedy for that breach. The more important policy consideration is returning the criminal fugitive to custody which is accomplished by upholding the terms of Aladdin's Indemnity Agreement.

However, even the DOI's two hypothetical circumstances do not present significant risk for the bail bond consumer. With respect to the first circumstance, Aladdin and other bail agents should as a matter of sound business practice attempt to utilize the least intrusive investigative tactics to secure the surrender of the defendant, including contacting the indemnitor and requesting his assistance in convincing the defendant to self-surrender. As noted above, consumers can contest unreasonable or excessive fees. The second circumstance identified by the DOI is addressed by Idaho Code § 41-1043 which limits an indemnitor's liability for the forfeiture and apprehension costs.

Finally, the DOI expresses concern over the fact that family and friends are sometimes involved in the bail process and are desirous of obtaining the release of the defendant and that these transactions sometimes take place outside of normal business hours. A.R. 114 (Final Order, p. 6). As set forth above, the overriding policy consideration notwithstanding the possible involvement of family in obtaining the bond should be the return of an absconding criminal defendant to custody. Further, most significant bonds are not posted at night. The typical bond for a felony is determined by a judge during the day and the bail transaction is accomplished during business hours. *See* Idaho Criminal Rules 4, 5 and 46(c). Bonds posted at night are generally for misdemeanors pursuant to a set schedule and the penal sum of the bonds for

misdemeanors are generally far less than for felonies. *See* Idaho Misdemeanor Criminal Rule 13. Additionally, the DOI acknowledges that it is appropriate for a bail agent to obtain collateral in connection with a bail bond and that collateral sometimes includes an indemnitor's home. An additional promise to reimburse bail agents for apprehension expenses incurred in the event of a breach does not dramatically alter the nature of the transaction. Indeed, as previously discussed, it often works to the significant financial advantage of the consumer by providing bail agents a financial incentive to return an absconder to court instead of simply letting the forfeiture stand and collecting the entire amount of the bond from that indemnitor.

d. permitting the recovery of apprehension costs is consistent with the Legislative history of Idaho Code § 41-1042

In addition to the plain language of Idaho Code § 41-1042 and its underlying public policy, this statute's legislative history establishes that the Idaho Legislature did not intend to preclude indemnity agreements permitting the recovery of apprehension costs such as that contained in the Third Paragraph. Prior to passing Idaho Code § 41-1042, the House Business Committee was aware that this new legislation would mean that a party who pledged collateral in order to obtain a bail bond on behalf of another could lose that collateral in the event the bail bond was forfeited. The Committee minutes reflect the following:

> **Rep. Douglas** presented an example of parents pledging title to their home as collateral for a bond to bail out their child from jail, and asked whether the parents would lose their home if the child skips bail. Mr. Duvall [charter president of the Professional Bail Agents of Idaho] said that this would be the case.

H 62, February 11, 2003 House Business Committee Minutes.[7]

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[7] *See* http://www.legislature.idaho.gov/sessioninfo/2003/StandingCommittees/hbusmin.html#feb11.

Because the obligation to pay the bail bond only arises upon forfeiture, an agreement to pay that forfeiture necessarily arises as part of a separate indemnity agreement. Although Idaho Code § 41-1042 does not explicitly permit recovery of a forfeited bond, such recovery is permissible because reimbursement for a forfeited bond is not a charge assessed for the bail agent's services in connection with the *bail transaction*.[8] Similarly, although Idaho Code § 41-1042 does not explicitly permit reimbursement for expenses incurred in apprehending and surrendering a criminal defendant, such reimbursement is also permissible pursuant to an indemnity agreement. It is nonsensical to interpret Section 41-1042 as permitting bail agents to contract through an indemnity agreement for the recovery of a forfeited bond but forbidding bail agents from contracting through an indemnity agreement for the recovery of apprehension costs, particularly when the statute is silent as to the types of contingent losses to which collateral may be applied.

e. the Idaho Supreme Court has recognized the propriety of bail agents' recovery of expenses pursuant to an indemnity agreement

Further, "courts must construe a statute under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." *D & M Country Estates Homeowners Ass'n v. Romriell*, 138 Idaho 160, 165, 59 P.3d 965, 970 (2002).

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[8] Again, the DOI readily acknowledges that the bail agent may recover the forfeited bond amount from the indemnitor pursuant to a prior agreement. A.R. 116,119 (Final Order, p. 8, 11); Tr. 7-21-2010) p. 15, ln. 7 - p. 16, ln. 6; *see also* Tr. p. 24, ln. 4-5 (3-8-10) (remarks by counsel for DOI acknowledging that "collateral" which the bail agent is permitted to collect during the bail transaction is to secure the bail bond); Tr. (3-8-10) p. 20, ln. 22-24 (DOI counsel discussing loss of collateral posted by third party indemnitor when defendant absconds); Tr. (3-8-10) p. 22, ln. 1-8 (DOI counsel stating that "the person who put up the collateral to secure that bond" has a stake in returning an absconder to court); and Tr. (3-8-10) p. 22, ln. 15-25 (DOI counsel arguing that collateral is about securing the bond because Section 41-1043 connects collateral to the amount of the bond).

Courts must assume that the legislature knew of all legal precedent when passing a statute. *D & M Country Estates Homeowners Ass'n*, 138 Idaho at 165, 59 P.3d at 970. Idaho Code § 41-1042 was passed in 2003, years after the Idaho Supreme Court recognized that bail agents may recover expenses pursuant to the terms of an indemnity agreement in *Martin v. Lyons*, 98 Idaho 102, 105, 558 P.2d 1063, 1066 (1977).

In *Lyons*, a third party entered into an indemnity agreement with the bail bond company and later disputed its liability under this agreement. *Id.* The court determined the indemnification clause at issue was reasonably read as allowing the bail agents to be indemnified for "voluntary" disbursements. *Id.* The Court reasoned that bail agents can recover consistent with the terms of the indemnity agreement. *Id.* ("[I]f the indemnification clause agreed to by [the indemnitor] and [the bail agents] allows indemnification for payments that are not legally required of the bail agents, then [the indemnitor] would be so obligated irrespective of whether the forfeiture of [the Principal's] bail was valid or invalid.") Because the legislature knew that the Idaho Supreme Court had acknowledged that bail agents could recover voluntary disbursements pursuant to indemnity agreements when it passed Idaho Code § 41-1042, and did not state the law should be otherwise, it is presumed that such recovery is still allowed. If this was not the case, the legislature would have explicitly stated as such.

f. <u>the DOI's position regarding the recovery of apprehension costs is novel and unsupported by authority from other jurisdictions</u>

The DOI's attempt to limit a bail agent's ability to contract for the recovery of apprehension costs in the event of a later breach by a criminal defendant is novel and unsupported by authority from other jurisdictions.

In *Saladino v. Stuyvesant Ins. Co.*, 39 A.D.2d 765 (N.Y. App. Div. 1972), a bail agent sought to recover, pursuant to an indemnity agreement, a $4,000 fee paid to a licensed investigator to apprehend and surrender the principal to custody. 39 A.D.2d at 765. The principal failed to appear at two court dates, thus the bail agent hired an investigator to locate him. *Id.* The court held that under the broad language of the indemnity agreement, the bail agent was entitled to recover expenses incurred in recapturing and surrendering the principal, provided such expenses are the fair and reasonable value of services rendered.[9] *Id.* However, because the principal was residing with his wife without any attempt at concealment and working at his regular employment, a $4,000 investigator fee was unreasonable. *Id.* As such, the court granted a new trial to determine the fair and reasonable value of the services rendered. *Id.* The *Saladino* court provided:

> While it may be that large contingent fee retainers are customary and are necessary in many cases to obtain effective results, there is no apparent reason why a surety should not first mount a more modest, superficial investigation such as would have been adequate to locate the principal herein.
>
> *Under the broad language of the indemnity agreement executed by [third party signor], [the bail agent] is entitled to reimbursement for expenses in connection with the apprehension of the principal.*

Id. (emphasis added).

In fact, it is a common practice throughout the United States for bail agents to utilize indemnity agreements to contract for reimbursement of expenses in the event of a breach by the criminal defendant. *See, e.g. Hernandez v. USA Bail Bonds*, 1999 WL 740441 (Tex. Ct. App.

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[9] Similar to Idaho Code § 41-1042, N.Y. Insurance Law § 6804, which sets forth the permissible premium or compensation for a bail bond, is silent as to reimbursement pursuant to indemnity agreements.

1999) (unpublished) (affirming settlement between bail bond company and third party indemnitors who "executed contracts to indemnify in which they agreed to act as sureties for [bail amount], plus all reasonable and necessary expenses incurred in apprehending [principal] in the event [prinicipal] forfeited his bond"); *Campbell v. A.A.A. Bail Bonds, Inc.*, 879 N.E.2d 1229, 2008 WL 187968 (Ind. App. 2008) (unpublished) (finding AAA acted as authorized agent when executing the indemnity agreement and therefore able to recover under the agreement for costs, expenses and fees incurred by AAA in returning defendant to custody); *and Calamita v. DePonte*, 122 Conn. 20, 187 A. 129 (1936) (action arising out of indemnity agreement where defendants agreed to indemnify bail bond sureties for damages and costs incurred by sureties because of accused's default).

Many states also have codified the foregoing practice. *See. e.g.* Del. Code Ann. 18, § 4347 (providing surety insurance contracts for bail bond agents to reimburse the bail agent personally, or permit the bail agent to have a right of action against the defendant or any indemnitor for actual expenses incurred in good faith, by reason of breach by the defendant of any of the terms of the written agreement); Mo. Ann. Stat. § 374.719 (providing bail bond agents with the authority to use collateral to reimburse costs in case of failure to appear for reimbursement of costs and expenses incurred); Nev. Rev. Stat. § 697.300(5) (providing for reimbursement or right of action "against the principal or any indemnitor, for actual expenses incurred in good faith, by reason of breach by the defendant of any of the terms of the written agreement under which and pursuant to which the undertaking of bail or bail bond was written"); Utah Code Ann. 1953 § 31A-35-608 (providing bail bond businesses the right to reimbursement for actual expenses incurred by the bail bond surety in good faith by reason of breach by the defendant of the bail

bond agreement); Ark. Admin. Code 164.00.1-23 (provides bail bond businesses the right to deduct from the collateral reasonable expenses incurred due to a breach of the bail bond contract); 10 Cal. Code Reg 10, § 2081 (providing bail licensee the right to reimburse himself for actual, reasonable and necessary expenses incurred and caused by a breach by the arrestee of any of the terms of the written agreement under which and pursuant to which the undertaking of bail or the bail bond was written).

The undersigned has been unable to locate authority from other jurisdictions which forbid a bail agent from entering into indemnity agreements at the time of the bail transaction which permit recovery of this contingent loss. The DOI's interpretation of an Idaho statute as forbidding this is novel and altogether inconsistent with the statutory, regulatory and case laws of other jurisdictions throughout the United States.

The public policy underlying bail bonds and encouraging the return of fugitives to custody, existing Idaho case law, the legislative history of Idaho Code § 41-1042 and overwhelming authority from other states all establish that bail agents are entitled to contract for the fair and reasonable value of costs incurred in connection with apprehending and surrendering a principal to the court's custody. Recognizing bail agents' ability to recover such costs furthers the public policy underlying bail bonds by promoting a criminal defendant's appearance in court.

4. The DOI's promulgation of a new rule purporting to implement Section 41-1042 does not change this Court's analysis

While Aladdin's petition for review was pending before the district court, the DOI promulgated a rule adopting the reasoning of its Final Order and purporting to implement Section 41-1042. *See* IDAPA 18.01.04.016 (effective 4-7-11) (providing that charges for returning a

defendant to custody after a breach of the bail bond contract, must be negotiated separately after the bail bond has been effectuated). This new rule is only valid to the extent the DOI's interpretation of Section 41-1042, as reflected in its Final Order, is correct. Because Section 41-1042 does not limit indemnity agreements such as that set forth in Paragraph Three, this Court should reverse the DOI's erroneous interpretation of Section 41-1042 irrespective of the foregoing rule.

"It is fundamental that the judiciary has the ultimate responsibility to construe legislative language to determine the law." *J.R. Simplot Co. v. Tax Com'n*, 120 Idaho 849, 853, 820 P.2d 1206, 1210 (1991), *citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001). "This principle extends to [this Court's] review of administrative rules, and it is this Court's responsibility to determine the validity of . . rule[s]." *Mason*, 135 Idaho at 583, 21 P.3d at 905. "An administrative rule that is inconsistent with a statute that it purports to implement is ineffective to the extent of such inconsistency." *State v. Perkins*, 135 Idaho 17, 22, 13 P.3d 344, 349 (Ct. App. 2000); *see also Moses v. Idaho State Tax Com'n*, 118 Idaho 676, 680, 799 P.2d 964, 968 (1990) ("This Court will not enforce a regulation that is, in effect, a rewriting of the statute").

The DOI's new rule purports to interpret and implement Section 41-1042. IDAPA 18.01.04.016 ("Charges and fees outside the scope of Section 41-1042, Idaho Code, such as charges for returning a defendant to custody after a breach of the bail bond contract"). Thus, this rule is only valid to the extent it is consistent with the legislature's intent in enacting Section 41-1042. Had the DOI promulgated this rule prior to Aladdin's request for a declaratory ruling, Aladdin could have challenged the rule's validity in an action for declaratory judgment pursuant

to I.C. § 67-5278(1). The inquiry in such an action would have been the same presently presented to this Court – whether Section 41-1042 precludes bail agents from entering indemnity agreements at the time of the bail transaction providing for reimbursement for apprehension expenses in the event the defendant breaches the bail bond agreement by failing to appear in court.

That the DOI promulgated a new rule to implement its interpretation of Section 41-1042 as described in the Final Order while this action was pending does not alter this Court's inquiry in this appeal. This Court should exercise its ultimate responsibility to construe legislative language by determining that Section 41-1042 does not limit indemnity agreements such as that described in Paragraph Three.

C. Substantial Rights of Aladdin Are Prejudiced By the DOI's Declaratory Ruling

Substantial rights of Aladdin have been prejudiced by the declaratory ruling of the DOI. *See* Idaho Code § 67-5279(4) ("Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced."). The declaratory ruling reflected in the DOI's Final Order was issued in response to the request for declaratory ruling sought by Aladdin. A.R. 109 (Final Order); A.R. 1 (Aladdin's request for declaratory ruling). This declaratory ruling specifically concerns the Indemnity Agreement for Surety Bail Bond utilized by Aladdin to transact business and forbids Aladdin "from entering into indemnity agreements for the reimbursement of apprehension costs, such as the Indemnity Agreement, Exhibit A to the December 10, 2009, letter request for declaratory ruling, contemporaneous with the bail transaction. . . ." A.R. 109, 121 (Final Order); A.R. 11-13 (Indemnity Agreement). Aladdin is financially harmed by this declaratory ruling which prohibits

Aladdin from seeking reimbursement of apprehension costs it incurs in apprehending a criminal defendant who has failed to appear in court as required pursuant to the terms of its Indemnity Agreement executed at the time of the bail transaction. Thus, Aladdin's substantial rights are prejudiced by this declaratory ruling.

V. CONCLUSION

Based upon the foregoing, this Court should reverse the Final Order because the DOI's declaration that Idaho Code § 41-1042 precludes Aladdin from entering into an indemnity agreement at the time of a bail transaction which permits collection of apprehension costs later incurred should a criminal defendant fail to appear as required is unreasonable and prejudices Aladdin's substantial rights.

Respectfully submitted this 3rd day of November, 2011.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

By_____
Scott McKay

CERTIFICATE OF SERVICE

I CERTIFY that on November 3, 2011, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

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